HOLCOMB DUNBAR

ATTORNEYS

October 5, 2015

Supreme Court of Mississippi
450 High Street
Suite 300
Jackson, Mississippi 39201

Re: ***Robert Swindol v. Aurora Flight Services Corporation***
Case No.: 2015-FC-01317-SCT

To the Honorable Justices of the Supreme Court:

In light of the Court's Order of September 4, 2015 finding that no further formal briefing is required, and inviting the parties to file letters with supplemental authority, please accept this correspondence on behalf of the Appellee, Aurora Flight Sciences Corporation ("Aurora") pursuant to Miss. R. App. P. 28(k), *Citation of Supplemental Authorities*. In addition, this correspondence serves as Aurora's response to the National Rifle Association of America, Inc.'s ("NRA") Proposed Amicus Curiae Brief ("NRA Brief").

This Court should decline to accept the Certification from the United States Court of Appeals for the Fifth Circuit, as the law in Mississippi concerning the public policy exception has been the subject of clear, controlling precedents from this Court, the language of Miss. Code Ann. §45-9-55 is clear, and this issue does not satisfy the requirements of Rule 20 of the Mississippi Rules of Appellate Procedure. Additionally, this Court has repeatedly declined to expand the public policy exception to employment at-will, and the facts in the case at bar establish that Plaintiff's actions do not fall within the existing exceptions to employment at-will. Finally, when this Court's decisions concerning statutory interpretation are applied to the Certified Question, it is clear that this case does not fall within the exception to the employment at-will doctrine in Mississippi. None of this is changed in the least by the NRA Brief.

Under Rule 20, certification is only appropriate if "there are no controlling precedents in the decisions of the Mississippi Supreme Court" on the question certified. As this Court, as well as the United States District Courts for the District of Mississippi, has repeatedly held, any expansion of this exception is a matter for the legislature and not the courts. This Court has had numerous opportunities since McArn to expand this public policy exception and on each occasion has refused to do so. McArn v. Allied Bruce-Terminix Co., 626 So. 2d 603 (Miss. 1993). (See also Defendant's Brief at U.S. Court of Appeals for the Fifth Circuit at 10 through 18). The NRA has provided no compelling reason why this Court should choose to do so now.

The NRA mistakenly argues that Aurora was engaged in illegal conduct when it terminated Swindol. (NRA Brief at 3-4). In support of its argument, the NRA cites the catch-all

HOLCOMB, DUNBAR, WATTS, BEST, MASTERS & GOLMON, P.A.
400 South Lamar, Suite A / Post Office Drawer 707 / Oxford, Mississippi 38655-0707
662-234-8775 / Fax: 662-238-7552 / holcombdunbar.com

penalty provision found in Mississippi Criminal Procedure Code § 99-19-31. In doing so, the NRA wholly ignores that Section 45-9-55 is not found in the Mississippi Criminal Code. As such, Section 99-19-31 does not, and cannot apply to Section 45-9-55, as Section 99-19-31 applies only to criminal offenses. In fact, every published case applying Section 99-19-31 counsel has been able to locate has applied it only to crimes. See, e.g., Purvis v. Purvis, 657 So. 2d 794, 798 (Miss. 1995); Gardner v. State, 547 So. 2d 806, 807 (Miss. 1989). There is absolutely no indication that the Mississippi legislature intended to make a violation of Section 45-9-55 a criminal offense. If they had, they likely would have placed it in Title 97 – Crimes. Had the legislature determined to take the extraordinary step of making a violation of Section 45-9-55 a criminal offense, they likely would have done so expressly, as they did with Section 45-9-101(15):

> Any person who knowingly submits a false answer to any question on an application for a license issued pursuant to this section, or who knowingly submits a false document when applying for a license issued pursuant to this section, shall, upon conviction, be guilty of a misdemeanor and shall be punished as provided in Section 99-19-31, Mississippi Code of 1972.

Id. They did not.

Instead, the legislature chose to include an immunity provision protecting employers from all suits for damages. Miss. Code Ann. § 45-9-55(5). This Court should soundly reject the NRA's proposal that employers who terminate employees for storing a firearm in their vehicles be punished by a $1000.00 fine and "*imprisonment in the county jail not more than six (6) months.*" Miss. Code Ann. § 99-19-31 (emphasis added). Had the Legislature wanted to criminalize this conduct, it could have, and it cannot be disputed that it did not.[1]

The fact that this Court should not accept this certified question is confirmed by the Fifth Circuit's recent decision in Crawford v. Bannum Place at Tupelo, 556 Fed. App'x. 279 (5th Cir. 2014). The plaintiff in that case, like Plaintiff in the case at bar, sought to expand Mississippi's employment at-will doctrine, and the Fifth Circuit had no difficulty in concluding that the plaintiff did not fall within the narrow exception established by this Court. Noting that the exceptions in McArn are "very narrow," the Fifth Circuit easily determined that the plaintiff did not have a cause of action. 556 Fed. App'x. at 285.

Moreover, the Mississippi Legislature has amended this statute on a number of occasions and had the opportunity, if it so desired, to either provide for a private cause of action under the statute or eliminate the broad damages immunity language contained in Subsection (5).

---

[1] The Attorney General's Opinion the NRA cites in support of its argument here (NRA Brief at 4) further supports Aurora's argument, not the NRA's, as that Opinion involved a statute (Section 47-1-19) with an express criminal penalty. This fact is conveniently omitted from the NRA Brief.

Subsection (5) could not be clearer:

> A public or private employer shall not be liable in a civil action *for damages* resulting from or arising out of an occurrence involving the transportation, storage, possession or use of a firearm covered by this section.

Miss. Code Ann. § 45-9-55(5) (emphasis added). There truly can be no dispute that the cause of action in this case "arose out of an occurrence involving the ...storage... of a firearm." There also can be no dispute that, in this case, Swindol sought no remedy other than damages.

The most reasonable interpretation of "an occurrence" is the plain meaning of that term – "something that takes place." Philip Babcock Grove, Webster's Third New International Dictionary of the English Language, Unabridged, at 1561 (1976). There can be no argument that, in this case, something took place – Swindol was terminated – as a result of his storing a firearm covered by Section 45-9-55.

House Bill 1141 included Amendment No. 2 in 2006, which added the language "to clarify liabilities of ... employers with respect to the transportation ... on employer's property." This language affirms that the Legislature intended to provide employers with immunity from actions such as those in the case at bar.

This Court has repeatedly declared its role in statutory interpretation:

> Our duty is to carefully review statutory language and apply its most reasonable interpretation and meaning to the facts of a particular case.

Pope v. Brock, 912 So. 2d 935, 937 (Miss. Ct. App. 2005).

This Court has recognized as well that it

> has no right, prerogative, or duty to bend a statute to make it say what it does not say. No citation of authority is necessary for the proposition that courts, judges, and justices sit to apply the law as it is, not make the law as they think it should be.

Franklin Collection Serv. v. Kyle, 955 So. 2d 284, 289-90 (Miss. 2007). Yet this is exactly what the NRA would have this Court do – twist and distort the language and plain meaning of Section 45-9-55 to provide a private right of action in damages where the legislature did not, in the face of a broad damages immunity provision.

These admonitions, coupled with the well-settled rule that Mississippi Courts cannot speculate as to what the legislature meant, or why it phrased a statute in a particular way, clearly establish that the statute at issue does not create a private cause of action and that the broad

immunity language contained in Subsection (5) controls the decision in the case at bar, prohibiting Swindol's claim for damages against Aurora. See Warren v. Johnston, 908 So. 2d 744 (Miss. 2005). That point is critical. It is not, as the NRA would have the Court believe, that plaintiffs in Mississippi would be left wholly without a remedy should this Court determine that Subsection (5) means what it says. It would mean only what the statute says - that they are prohibited from bringing a civil suit *for damages*. Injunctive relief may still be available to them, although that question is not before the Court, as Swindol does not seek any type of equitable relief.

The NRA also argues that Swindol's termination falls outside the scope of the employment at-will doctrine because it was "independently declared legally impermissible." (NRA Brief at 4). As an initial matter, Aurora addressed the employment at-will doctrine, and the McArn exceptions, at length in its brief before the Fifth Circuit, and will not do so again here. Suffice it to say that Swindol was neither terminated for refusing to engage in illegal activity nor for reporting it, and the McArn exceptions do not apply.

Moreover, even if the legislature has crafted an exception to the employment at-will doctrine, as the NRA argues, it has carved out of that exception one type of remedy – the only remedy Swindol seeks – civil suits for damages. As such, even if the Court were to agree with the NRA on this point, Swindol's Complaint should still be dismissed, as he seeks the only remedy expressly unavailable to him.

The NRA cites several post-McArn decisions in support of its argument for an expansion to the McArn exceptions to the employment at-will doctrine. Each of them supports Aurora's position at least as well as it does Swindol and the NRA's. First, like the statute at issue in Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981), Section 45-9-55, contrary to the NRA's representation "does not contain a provision for retaliatory discharges, nor does it contain a provision making it a crime for an employer to discharge an employee for" possessing a firearm. See Kelly, 397 So. 2d at 876. Rather, it contains an immunity provision protecting employers from all civil suits for damages. Thus, if anything, Section 45-9-55 expressly provides stronger protections for employers than does the Workmen's Compensation Law. If this is not what the legislature intended, then they, and not this Court, should revise the statute.

Likewise, Willard v. Paracelsus Health Care Corp., 681 So. 2d 539 (Miss. 1996), stands only for the proposition that a plaintiff may pursue punitive damages when asserting a wrongful discharge claim under McArn. It does not expand the McArn exceptions, or create a new exception, as Swindol and the NRA would have the Court do here. Moreover, Moniodis v. Cook, 494 A.2d 212 (Md. Ct. Spec. App. 1985), a Maryland case applying Maryland law, has no persuasive value in this case. Simply because this Court relied on Moniodis in support of its decision to extend a remedy for a McArn claim does not mean that, a fortiori, the Court must rely on it to create a new exception to the at-will employment doctrine.

The difference between this case and Mitchell v. Univ. of Ky., 366 S.W.3d 895, 896-97 (Ky. 2012), as the NRA correctly admits, is that "the Kentucky statutes *expressly conferred a civil cause of action* and *Kentucky's public-policy exception arguably is broader* than this State's." (NRA Brief at 7) (emphasis added). This Court should give no weight to the decision

of another court, applying a very different statute with broader exceptions to the at-will employment doctrine. Of course, none of the cases cited by the NRA involved a statute containing the broad immunity language found in Subsection (5).

Finally, the NRA's argument that Section 45-9-55(5) applies only to protect employers from liability arising due to an employee's actions finds no basis in the statute itself, or in the legislative history. Commentary contained in newspaper articles, taken wholly out of context, should be considered less than persuasive on this point. The language of Subsection (5) is straightforward and unambiguous, and should be given its plain meaning.

It is clear that the facts in the Complaint do not state an exception to the employment at-will doctrine, or a cause of action under Miss. Code Ann. § 45-9-55. This Court should decline to accept the question certified or, if it is accepted, answer it in the negative.

Very truly yours,

R. Bradley Best

RBB:mss

cc: David O. Butts, Esq.
Michael B. Wallace, Esq.
Stephen W. Robinson, Esq.
Nicholas D. SanFilippo, Esq.